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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

March 19, 1993

The Honorable James Quello
Acting Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Dear Chairman Quello:

I am writing you with respect to the Commission's upcoming regulations implementing the consumer rate protection provisions

The Honorable James Quello
March 19, 1993

Congress made a deliberate choice to include cable programming services within the ambit of regulation by rejecting the Packwood Amendment in the Senate and the Lent Amendment in the House. In my statement during Senate debate on the Packwood Amendment, a copy of which is attached, I detailed the reasons why effective consumer protection required coverage of rates for cable programming services. Without such coverage, as the FTC staff observed in comments to the FCC, cable's "market power will be largely unchecked." Cable's market power would also be unchecked, and the benefits to consumers of coverage of cable programming services lost, if scrutiny of rates for cable programming services is too lenient.

Congress has also indicated, through its actions, that scrutiny of the so-called enhanced basic tiers is to be more than perfunctory or focused on a few "bad actors." In 1990, when the Senate Commerce Committee first reported S.1880, the predecessor to the Cable Television Consumer Protection and Competition Act, it allowed the FCC to limit rates for cable programming services only if the FCC found those rates to be "significantly excessive." I strongly objected to the "significantly excessive" standard at that time, pointing out that it was like telling a thief that he could commit larceny, but not grand larceny. As a result of efforts by me and others with similar concerns, when the Commerce Committee drafted its substitute for S.1880, the "significantly excessive" standard was changed to allow the FCC to set aside any "unreasonable" rates for cable programming services. This unreasonableness standard was then carried over into the provisions of S.12, which became law.

For these reasons, I view to be inconsistent with congressional intent the proposal in the NPRM to have the FCC deem 95-98% of rates charged by cable operators for cable programming services to be reasonable. Had Congress intended only to protect consumers against the top 2-5% of rates for cable programming services, it would have adopted the "significantly excessive" language proposed in 1990.

I was also extremely troubled by the suggestion in the NPRM that "there may be a tradeoff between the severity of the restrictions that may be placed on basic tier rates and rates for other cable programming services." There is no support in the statute for the existence of such a tradeoff. The goal of the consumer rate protection provisions of the Cable Television Consumer Protection and Competition Act of 1992 was to protect consumers from undue exercise of market power across the entire range of monopoly services, including cable programming services. There was certainly no intent to constrain the monopoly pricing for basic services, which most consumers can receive for free with

an antenna, while permitting monopoly pricing for cable programming services, which are true monopoly services in most areas.

The Commission, in its NPRM, also indicated that it is considering permitting cost-of-service justifications for rates that do not meet the FCC's proposed benchmark. While this is

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Thank you for your consideration of these matters. I would appreciate it if a copy of this letter would be placed in the Commission's public file of the rate regulation proceeding.

Sincerely,

JOSEPH I. LIEBERMAN
Chairman, Subcommittee on Regulation and Government Information

in the video marketplace. We also know that over two-thirds of all viewing by cable subscribers is of local, over-the-air television. This has set up a situation where a popular broadcaster may wind up subsidizing its cable competitor in its programming and marketing efforts.

I am convinced that retransmission consent is a procompetitive proposal that will help to provide a measure of balance that is currently lacking.

Mr. INOUYE addressed the Chair.

The PRESIDENT pro tempore. The Senator from Hawaii.

Mr. INOUYE. I yield 10 minutes to my friend from Connecticut.

The PRESIDENT pro tempore. The Senator from Connecticut [Mr. LIEBERMAN] is recognized for 10 minutes.

Mr. LIEBERMAN. I thank the Chair, and I thank my distinguished colleague from Hawaii.

Mr. President, I rise today in support of S. 12 as reported by the Commerce Committee, and in opposition to the substitute offered by Senator PACKWOOD and my other colleagues.

Mr. President, we are facing a terrible recession here in the United States today in which many ordinary Americans are having a tough time making ends meet. Just a couple days ago, in his State of the Union Address, President Bush challenged all of us here in Congress to put aside partisan differences and work together for the good of the country.

Well, Mr. President, now is the time to start, and this bill is the place, because S. 12 will save money for ordinary consumers. It will rein in what monopolists usually can step in to place limits on a monopolist even if the Federal Government will not act. I say that from experience have been privileged to serve as attorney general of my State before coming to the Senate. But that is not the case with cable. Starting in 1984, Congress and the FCC decided to deregulate virtually all cable systems and services in the United States. Prior to that, we had a system in which States and localities had granted de facto monopoly franchises to the cable companies and then understandably set up a system to regulate their price and quality.

Then Congress came along with a usurpation of the State and local authority and banned the States and local governments from regulating any cable service except those that the customer could get with an antenna—which Congress called basic cable service—and it allowed basic cable to be regulated, even that lower tier, only in the absence of effective competition.

The FCC then halted even that modest amount of regulation by declaring that effective competition existed wherever the consumer could receive three over-the-air television stations. Mr. President, honestly, that was like saying the Pony Express was an effective competitor to the iron horse. Cable was free to charge as much as it wanted, without threat of regulation or the competition of a marketplace.

It is no surprise what happened to rates as a result. According to the GAO, since deregulation became effective at the start of 1987, the price of

Current law does not recognize this reality. Under the 1964 Cable Act, even in the absence of effective competition, only the tier containing the local broadcast signals can be regulated, and that is an important point. As the Department of Justice itself has observed in comments filed with the FCC, "cable services offered outside of the basic tier may not be subjected to rate regulation even if those services are found to be the sole source of significant market power possessed by local cable systems." No nonbroadcast services can be regulated unless they are packaged with broadcast channels.

This gives cable monopolists a giant loophole. They can avoid regulation of the prices charged for their most popular programming, such as CNN, MTV, and ESPN, simply by putting these services in a separate tier where they still face no effective competition. Then, as the FTC staff observed in comments to the FCC, "their market power will be largely unchecked."

Cable is already busy exploiting this loophole. GAO reported that in 1991 the number of cable systems offering two or more tiers jumped from 16.6 to 41.4 percent. And, as the Wall Street Journal reported 2 weeks ago, upper tier subscribers continue to face significant rate increases which cannot now be controlled under any legal circumstances by the FCC or by franchising authorities. The result was summed up by an FCC official: "It's annoying to the consumer because what they want isn't regulated. * * *"

sumers' wallets will continue to be grabbed—and we in Congress—unfortunately, if we adopt this substitute—will again have sanctioned this financial mugging.

S. 12, on the other hand, promises real reform. Under S. 12—and not the substitute—the FCC will have the authority to protect consumers against unreasonable, monopoly cable rates for both broadcast channels and the nonbroadcast, enhanced basic packages—such as tiers of CNN, MTV, and ESPN—that consumers want to buy. S. 12 will close the retiering loophole. Cable operators will not be able to use a tier of the most popular cable offerings simply as a device to avoid rate regulation and continue to gouge consumers.

I know some have argued that we should forego rate regulation now and wait for competition to develop, perhaps helping competition along by allowing the telephone companies to develop cable-type services or by pushing franchising authorities to authorize more cable overbuilders. But competition and the interim rate regulation of S. 12 are not mutually exclusive op-

Mr. President, I am not against cable. I am for it. I do not want to be unfair to cable. I just do not want cable to be unfair to the American consumer. And only S. 12, and not the substitute, puts significant checks on cable's monopoly power while still promoting competition. That is why I support it and oppose the substitute and why I congratulate the Senator from Hawaii, the Senator from Missouri, and the others who brought forth this outstanding piece of consumer protection legislation.

The PRESIDENT pro tempore. The Senator from Alaska.

Mr. STEVENS. Mr. President, Senator PACKWOOD wishes to have 8 or 9 minutes. I yield him that amount of time as much time as he wishes to use; 5 minutes to the Senator from Texas [Mr. GRAMM].

The PRESIDENT pro tempore. The Chair did not understand the Senator. Would the Senator repeat, please?

Mr. STEVENS. I am sorry, the request was for 9 minutes for the Senator from Oregon [Mr. PACKWOOD] and I yield 5 minutes to the Senator from Texas [Mr. GRAMM].

The PRESIDENT pro tempore. The

any other video programmer or video programming distributor unless such regulation is clearly necessary to protect the public interest.

The provisions of our amendment have been carefully drawn to try to ensure people's concerns are addressed while avoiding stifling the cable industry with unnecessary regulation. The amendment also tries to infuse competition into the video marketplace. For example, in order to enhance competition, we propose:

First, to eliminate certain FCC broadcast multiple ownership rules that restrict the ability of broadcasters to take advantatge of economies of scope and scale;

Second, to expand the rural exception to the cable-telephone crossownership prohibition to permit telephone companies to provide cable service in communities with up to 10,000 residents;

Third, to prohibit unreasonable denials of second franchises and guarantee that second franchises be given at least as much time to construct their systems as was given the initial franchise recipient;